

Mr. President, this reauthorization reform for Amtrak is long overdue, but it is on the right track.

# EXECUTIVE SESSION

## NOMINATION OF CHRISTINA A. SNYDER, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the nomination of Christina A. Snyder, which the clerk will report.

The legislative clerk read the nomination of Christina A. Snyder, of California, to be U.S. district judge for the central district of California.

Mr. THOMAS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. LEAHY. Mr. President, I am glad to see that the Senate is finally turning its attention to the nomination of Christina Snyder. She was first nominated in May 1996, over 17 months ago. Her hearing was finally held in July of this year and after another 2-month delay, she was reported by the Judiciary Committee without objection. She has been pending on the Senate Calendar without action and without any explanation for the 2-month delay that has since ensued.

It seems that the delay in considering her nomination had nothing to do with her outstanding qualifications or temperament or ability to serve as a Federal judge. Rather, it seems that some opposed this fine woman and held up her nomination to a very busy court because she had encouraged lawyers to be involved in pro bono activities.

Ms. Snyder has been held up anonymously for months and months. When the Judiciary Committee finally met to consider her nomination, I was curious to learn who and what had delayed her confirmation for over a year. But no one spoke against her and no one voted against her.

Ms. Snyder has been an outstanding lawyer, a member of the American Law Institute, and someone who contributes to the community and has lived the ethical consideration under Canon 2 of the Code of Professional Responsibility. I congratulate her on her outstanding career.

When she was being interrogated about her membership on the boards of Public Counsel and the Western Center on Law and Public Interest, Senator FEINGOLD properly observed:

[I]t is kind of an irony when we get to the day where if you don't participate in pro bono activities, you are somehow in a situation where your record is a little safer vis a vis being appointed to a Federal judgeship. And then when you get involved in pro bono activity, that might actually cause you to

get a few more questions. . . . [T]hat can't be an encouragement for lawyers to get involved in pro bono activities on behalf of people who don't have the ability to go to court very easily.

After all these months, I was please to hear Senator SESSIONS pronounce Ms. Snyder "an outstanding individual with a fine record" and "a capable lawyer of integrity and ability," when her nomination was considered by the Judiciary Committee.

I congratulate Ms. Snyder and her family and look forward to her service on the Federal court.

Although I am delighted that the Senate will today be confirming Christina Snyder as a Federal district court judge, the Republican leadership has once again passed over and refused to take up the nomination of Margaret Morrow. Ms. Morrow's nomination is the longest pending judicial nomination on the Senate Calendar, having languished on the Senate Calendar since June 12.

The central district of California desperately needs this vacancy filled, which has been open for more than 18 months, and Margaret Morrow is eminently qualified to fill it. Thus, while the Senate is finally proceeded to fill one of the judicial emergency vacancies that has plagued the U.S. District Court for the central district of California, it continues to shirk its duty with respect to the other judicial emergency vacancy, that for which Margaret Morrow was nominated on May 9, 1996.

Just 2 week's ago, the opponents of this nomination announced in a press conference that they welcomed a debate and rollcall vote on Margaret Morrow. But again the Republican majority leader has refused to bring up this well-qualified nominee for such debate and vote. It appears that Republicans have time for press conferences to attack one of the President's judicial nominations, but the majority leader will not allow the U.S. Senate to turn to that nomination for a vote. We can discuss the nomination in sequential press conferences and weekend talk show appearances but not in the one place that action must be taken on it, on the floor of the U.S. Senate.

The Senate has suffered through hours of quorum calls in the past few weeks which time would have been better spent debating and voting on this judicial nomination. The extremist attacks on Margaret Morrow are puzzling—not only to those of us in the Senate who know her record but to those who know her best in California, including many Republicans.

They cannot fathom why a few senators have decided to target someone as well-qualified and as moderate as she is. Just this week I included in the CONGRESSIONAL RECORD a recent article from the Los Angeles Times by Henry Weinstein on the nomination of Margaret Morrow, entitled "Bipartisan Support Not Enough for Judicial Nominee." This article documents the deep

and widespread bipartisan support that Margaret Morrow enjoys from Republicans that know her. In fact, these Republicans are shocked that some Senators have attacked Ms. Morrow.

For example, Sheldon H. Sloan, a former president of the Los Angeles County Bar Association and an associate of Gov. Pete Wilson, declared that: "My party has the wrong woman in their sights." Stephen S. Trott, a former high-ranking official in the Reagan administration and now a Court of Appeals Judge wrote to the majority leader to try to free up the Morrow nomination, according to this article Judge Trott informed Senator LOTT:

"I know that you are concerned, and properly so, about the judicial philosophy of each candidate to the federal bench. So am I. I have taken the oath, and I know what it means: follow the law, don't make it up to suit your own purposes. Based on my own long acquaintance with Margaret Morrow, I have every confidence she will respect the limitations of a judicial position."

Robert Bonner, the former head of DEA under a Republican administration, observed in the article that: "Margaret has gotten tangled in a web of larger forces about Clinton nominees. She is a mere pawn in this struggle." I could not agree more.

I ask unanimous consent to have printed in the RECORD an article by Terry Carter from the Los Angeles Daily Journal entitled "Is Jihad on Judicial Activism About Principle or Politics?" In that article Senator SESSIONS is quoted as saying that the Senate "can have a vote on [Morrow] nomination tomorrow." Well, today is tomorrow. It is high time to free the nomination of Margaret Morrow for debate and a vote.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Los Angeles Daily Journal, Nov. 6, 1997]

## IS JIHAD ON JUDICIAL ACTIVISM ABOUT PRINCIPLE OR POLITICS? (By Terry Carter)

WASHINGTON.—Three years after being nominated for the federal bench—having been branded a California "activist," grilled by Senate Judiciary Committee members about her personal voting habits and consigned to nomination limbo by an unidentified senator's "hold"—it would have been understandable if Los Angeles lawyer Margaret Morrow began composing a withdrawal letter in her head.

If she did, she could have looked for inspiration to what previous failed nominees had written.

"Despite the unpleasantness of the process, I am grateful for the honor of having had your support," one would-be federal judge wrote to his sponsor. ". . . For a while there, I really thought that your Herculean efforts had overcome the false and misleading charges that were made against me."

The author of that letter found salve in a manner few dream of. After his 1986 bid for a judgeship fell to a party line vote, then-Alabama U.S. Attorney Jeff Sessions, who faced questionable charges of racial insensitivity during Judiciary Committee hearings, went on to become a two-term governor and was

elected to the Senate in 1994 along with a number of other uncompromising firebrands. Today, Sessions sits on the very Judiciary Committee that rejected him, and he holds his thumb up or down on judicial nominations.

In an interview, Sessions said, "We can have a vote on [Morrow] tomorrow as far as I'm concerned. And I'd want to talk about some of her writings and statements and the Senate could vote." Sessions went on to say, "Margaret Morrow has written disrespectfully of the potential for good public policy coming out of the referendums in California. We have a real popular uproar over judges who've overturned referendums."

She likely would be, Sessions said, "a judicial activist."

In the judicial activism wars, Morrow will be either a victim or a survivor. In the spring, Morrow, a partner with Arnold & Porter and the first woman president of the State Bar, made it through the committee on a 13-5 vote.

Tough questions from, among others, Sen. Charles Grassley, R-Iowa, about how she voted on past state referenda were seen by many observers as transparent attempts to see how, as a judge, she might rule on matters concerning immigration, the death penalty, medical use of marijuana and other hot-button issues. But she seemed to weather the storm. Even the conservative Judiciary Committee chairman, Sen. Orrin Hatch, R-Utah, finally pronounced Morrow fit, saying his reservation about her potential for judicial activism had been assuaged. Now that her name has gone to the floor, her candidacy is promised a full-fledged debate by both sides.

Either way, Morrow has come to define the renewed flare-up of the age-old debate over the role of judges, predicted 200 years ago by Madison and Hamilton in the *Federalist Papers*. But there is a difference this time. Swirling in the background is a clash of old and new politics on Capitol Hill, particularly among Republicans campaigning for re-election and intent on keeping control of the Congress, even as they battle among themselves over leadership.

Republicans didn't have to look far to find a bogeyman in the judiciary—which not only is a good target, but it can't fight back.

Chasing so-called judicial activists is more than sucker-punching a patsy, as liberals put it. It gives Republicans something to do together while battling over party leadership. The excesses, the speed, have come mostly from the Young Turks and some old hands trying to get ahead. Whenever one pulls a foot off the accelerator to slow it down, another jams it to the floor—and no one wants out of the car.

"On this issue it's more strategy and tactics that bring disagreement among conservatives, not goals and objectives," said Elliot Minberg, counsel for the liberal interest group People for the American Way. The Young Turks and the establishment all agree to keep as many Clinton nominees off the bench as they can in a four-year stall, as much as they can get away with it.

The old guard hasn't gone out of its way to thwart the excesses. One of the most extreme of those was the announcement by Rep. Tom DeLay, R-Texas, earlier this year that he would seek impeachment of activist judges. DeLay recently reiterated the threat, and added that he wants it to "intimidate" judges.

Republican colleagues are quick to say that's beyond the pale, that impeachment for individual rulings won't happen, but, they admit, they like how it pushes the curve farther to the right.

A good example of that right-shifting spectrum is Hatch's unilateral move earlier this

year to end the American Bar Association's formal role of advising the Senate on judicial nominations, though individual senators still receive reports, and the more important pre-screening for the White House continues. Hatch told colleagues privately that he did so to keep the hard liners from doing worse. He said he's in the middle, but the middle keeps moving to the right.

The hunt for judicial activists is also proving a good fund-raising tool for some Republicans. Another freshman senator on the Judiciary Committee, John Ashcroft, R-Mo., already is signaling a run for the presidency. It was Ashcroft who placed the "hold" on the Morrow nomination, it was revealed last month. And Ashcroft used his chairmanship of the subcommittee on the Constitution, Federalism and Property Rights to hold hearings on judicial activism this year. "It's a good launching pad," said one Hill staffer. A sophisticated Internet user, Ashcroft at one point dedicated much of his Web site to judicial activism.

He is one of only 10 senators, for several months one of only six, to sign the so-called Hatch Pledge, which was crafted in February by the Judicial Selection Monitoring Project, a spinoff of the conservative Free Congress Education and Research Foundation. Each senator was asked to sign the pledge. It seized a sentence from a speech by Hatch at a Federalist Society meeting in his home state. "Those nominees who are or will be judicial activists should not be nominated by the president or conformed by the Senate, and I personally will do my best to see that they are not."

Hatch himself declined the request, citing personal policy against signing pledges, but he praised the efforts of the coalition of 260 conservative groups brought together by the Judicial Selection Monitoring Project. Also not joining Ashcroft in signing it were Grassley and Sessions. "I believe in fighting judicial activism but I don't need to sign a pledge," Sessions said. While judicial activism has been debated hotly the past two years in a presidential campaign, congressional hearings, on op-ed pages and in think tanks and bar panel discussions; the term's definition remains slippery. "It has been debased by conservatives so badly it has degenerated into an epithet for decisions you don't like—it's aimed only at results," said Bruce Fein, a former high-ranking official in the Ronald Reagan Justice Department.

Just the same, the debate quickened and became more focused in June when the Supreme Court struck down federal laws concerning religious freedom, Internet decency and handgun regulation. Outcries from both the left and the right questioned the process—calling it judicial activism—that led to these results.

No one did so more strongly than Hatch, who is considered by many to be an ideological soul-mate of Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. But those three were in the majority that were against Hatch's own Religious Freedom Restoration Act, which Congress enacted to maneuver around an earlier Supreme Court ruling.

"The Supreme Court has thrown down a gauntlet," Hatch said in a statement released the day after the decision was announced. "I intend to pick it up." After stumping against judicial activism for the better part of a year, Hatch suddenly expanded the term. Now he complained about "conservative judicial activism."

Perhaps, as a result, there will be a finer point to the debate, which is likely to continue. It has quickened in academia. But asking legal scholars to define judicial activism is like asking judges to interpret the Constitution. Often the only common thread

is their certainty. An activist against judicial activism, Thomas Jipping of the Judicial Selection Monitoring Project offers a quote from Humpty Dumpty in a colloquy with Alice after she ventured beyond the looking glass: "When I use a word it means just what I choose it to mean—neither more nor less."

Without using the term, Justice John Paul Stevens, in a 35-page dissent in *Printz v. US*, which struck down parts of the Brady Handgun Violence Prevention Act, chided his conservative colleagues—Rehnquist, Scalia, and Thomas in particular—for engaging in the kind of judicial activism they've eschewed so vocally in the past. Stevens pointed out that they had resorted to "emanations" and "penumbras" from the Constitution, tools liberals often are accused of wielding to torture the document.

While there is no locus classicus defining judicial activism, Laurence Tribe at Harvard Law School may trump them all: "To say there is a neutral vantage point outside the system for someone to declare in an Olympian and purportedly objective way that this is activism and that is restraint is itself a rather arrogant delusion."

But then, Tribe comes from the "eye of the beholder" school of thought, which tends to be composed of liberals. Those in the middle offer "on the one hand, and not the other" definitions. And conservative scholars usually define the term in considerable detail and nuance, with explanations of the mistakes others make in trying to do so.

Most are quick to mention specific cases, both old and recent. Some still argue *Marbury v. Madison*, 5 U.S. 137 (1803).

The conservative constitutional law professor Michael McConnell, now teaching at the University of Utah College of Law, made this response to Tribe. During the past 10 to 20 years, he said, the term judicial activism "has been a rhetorical theme of conservatives criticizing the court, and it's only natural that their ideological opposites would try to deconstruct and weaken that by saying it could be anything in the eye of the beholder."

McConnell offered a definition: "When a court imposes its own moral or political judgments in place of those of the democratically elected branches, without adequate warrant in the constitutional text, history, structure and precedent." But then he acknowledged the eye-of-the-beholder argument. "The devil is in the subordinate clause because we all see that differently," McConnell added.

A corollary to the argument that judicial activism is in the beholder's eye might be that made by some that it is necessary. Conservatives have complained for years that liberals went to the courts to get policy they couldn't muster through legislatures. Now many conservatives would like to turn the tables.

Clint Bolick, director of the libertarian Cato Institute's Center for Constitutional Studies, believes the courts "should play a feisty role." The courts, particularly the Supreme Court, were intended to be "a vigorous guardian of individual liberties against the encroachment of other branches of government," he explained. So at Cato, "we're in the business of securing judicial activism of the right kind, as in the correct kind." The Supreme Court's decisions striking down several federal laws this past term are "the way the court is supposed to be activist," he said.

In a more playful take on reining in judicial activism a belt with a jagged edge, the pro-life, Christian-oriented Family Research Council in June announced winners of its Court Jesters Award, for judges it believes stepped out of bounds. Noticeably missing

from the list, as the conservative gratify Fein pointed out, were two who made headlines during the year. One is federal Judge John Spizzo in New York, who acquitted two men arrested for blocking access to an abortion clinic because their actions stemmed from "conscience-driven religious belief" rather than willful criminal intent. The other is a state court judge in Alabama who posted in Ten Commandments in his courtroom and invited clergy to lead juries in prayer prior to hearing cases. The FRC's director, Gary Bauer, was willing to offer a written definition of judicial activism for this story but was unavailable over several weeks for an interview to discuss the topic.

"So many conservatives are so unprincipled in attacking judicial activism because the real grievance is against the results they don't like," said Fein, a columnist for the conservative Washington Times newspaper and a regular commentator on CNN, "And the standards Republicans are now voicing to screen Clinton nominees is what they said in the Bork hearings should never be applied," he said referring to the failed Republican nomination of Robert Bork in 1986.

The Jihad against judicial activism is seen some, in part, as the continuation of a dynamic the simmered through the Bork hearings: a long continuing battle against the Warren and Burger court. For one such attack through the rear-view mirror former attorney general Edwin Meese appeared Ashcroft's hearings on judicial activism. A fellow the Heritage Foundation, Meese followed up, releasing to the Judiciary Committee a report titled "Putting the Federal Judiciary Back on Track." The former Reagan administration official wants a number of landmark decisions by the Warren and Burger courts reversed, and agrees with Bork much-criticized belief that Congress should be empowered to overrule Supreme Court decision by simple majority vote.

For some, that rear-view mirror is cloudy. "The irony of complaints now about judicial activism," said Professor Erwin Chemerinsky of the University of Southern California Law School, "is that the majority of justices on the Supreme Court and the majority of federal judges are Republican appointees. And the Supreme Court hasn't recognized a new constitutional right in 25 years."

That may be why many believe the judicial activism wars are more of a political tool. Federal judges and the Supreme Court are "pushing fewer hot bottoms than they were 25 or 30 or 40 years ago," said A.E. Dick Howard, a constitutional scholar at the University of Virginia School of Law. The debate over judicial activism "is not as hot today. No attack on the modern court is comparable to [President Richard] Nixon's attacks on the Warren court."

There is no broad-based criticism of the courts today that compares to the time of Brown v. Board of Education, 347 U.S. 483 (1954), and issues of one-person-one-vote and school prayer. Howard explained. Criticism today is more episodic, he said.

On Capitol Hill, senators trying to break the lock on judicial nominations believe Chief Justice Rehnquist should go further than criticizing it in his annual report on the judiciary, "Who reads that?" asks one Senate staffer, "He needs to get out and say it in speeches." And others say that if President Clinton went to war over one or two judges, win or lose in Senate confirmations, the floodgates would open for all the others. "Every time a president has fought, if it looks like he's fighting for principle, he wins politically," said Professor Herman Schwartz, of American University's Washington College of Law. "People would pay attention, American like an independent judiciary."

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Christina A. Snyder, of California, to be U.S. District judge for the central district of California? The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Colorado [Mr. CAMPBELL] is necessarily absent.

The result was announced—yeas 93, nays 6, as follows:

[Rollcall Vote No. 297 Ex.]

YEAS—93

Abraham	Frist	Mack
Akaka	Glenn	McCain
Allard	Gorton	McConnell
Ashcroft	Graham	Mikulski
Baucus	Gramm	Moseley-Braun
Bennett	Grassley	Moynihan
Biden	Gregg	Murkowski
Bingaman	Hagel	Murray
Bond	Harkin	Nickles
Boxer	Hatch	Reed
Breaux	Helms	Reid
Brownback	Hollings	Robb
Bryan	Hutchinson	Roberts
Bumpers	Hutchison	Rockefeller
Byrd	Inhofe	Roth
Chafee	Inouye	Santorum
Cleland	Jeffords	Sarbanes
Coats	Johnson	Sessions
Cochran	Kempthorne	Shelby
Collins	Kennedy	Smith (NH)
Conrad	Kerrey	Smith (OR)
D'Amato	Kerry	Snowe
Daschle	Kohl	Specter
DeWine	Kyl	Stevens
Dodd	Landrieu	Thomas
Domenici	Lautenberg	Thompson
Dorgan	Leahy	Thurmond
Durbin	Levin	Torricelli
Feingold	Lieberman	Warner
Feinstein	Lott	Wellstone
Ford	Lugar	Wyden

NAYS—6

Burns	Craig	Faircloth
Coverdell	Enzi	Grams

NOT VOTING—1

Campbell

The nomination was confirmed.

#### LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will return to legislative session.

#### ORDER OF PROCEDURE

Mr. LEAHY. I see the distinguished majority and minority leaders on the floor. If they are seeking recognition, obviously I yield, but I ask that I be recognized for less than 5 minutes after they are finished.

Mr. LOTT. I thank the Senator for being willing to yield. I think the Senators would like to hear a little bit more about what the schedule would be, and now is a good time to do it.

I ask unanimous consent once we have completed this discussion, Senator LEAHY be recognized for 5 minutes to speak as he sees fit.

The PRESIDING OFFICER (Mr. HUTCHINSON). Without objection, it is so ordered.

#### MORNING BUSINESS

Mr. LOTT. I ask unanimous consent there now be a period of morning busi-

ness until 3:30, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### APPROPRIATIONS COMMITTEE MEETING

Mr. STEVENS. I announce to the Senate that the Appropriations Committee will meet tomorrow at noon to see if we can devise a way to complete action on all bills tomorrow. That is tomorrow at 12 noon in 128.

#### SCHEDULE

Mr. LOTT. Mr. President, Senator DASCHLE and I have been talking about the rest of the schedule this afternoon.

First, once again, I am very pleased that after 3 years of effort, we have a bipartisan compromise on Amtrak reform. That was a good day's work. It still has to go to conference, but I believe now that we have a good chance to get that legislation through. That would be very beneficial to maintaining a national rail passenger system that would pay for itself.

I believe we are now prepared to go to the D.C. bill. We have worked out an agreement on that. Then later on this afternoon we hope to be able to have another vote. We hoped we would get something on the labor-HHS appropriations conference report. We don't know for sure, but that may not be possible. We still have the option to go back to fast track, and there are some amendments, I am sure, that are in the offing. But whatever votes we would have this afternoon, and it appears it would be a minimum of one more vote, but the last vote for today would occur not later than 5 p.m. this afternoon, and we would then come back in tomorrow at noon and get an assessment of where we are.

We are still hoping there may be an FDA reform conference report agreement. There is a possibility. We have worked out an agreement on the adoption-foster-care issue. If either of those are ready, we would try to do those tomorrow afternoon. We also would get an assessment of what will happen with regard to the appropriations bills coming from the House and also see if there is any way we can take some action that would help to expedite some conclusion to the appropriations process.

With regard to fast track, we will continue to go back to it and have discussion, debate, and amendments when they are ready. The House has delayed their taking a vote on fast track until Saturday or Sunday. They will not do it today. Of course, that will have an impact on what we do and when we do it. I don't think we can say anything beyond that until we see what happens in the House.

We have been asked by our colleagues in the House and by the administration to stay and continue to work to see if we can resolve the outstanding issues